

**United States Department of Labor
Employees' Compensation Appeals Board**

A.H., Appellant)	
)	
and)	Docket No. 22-0681
)	Issued: December 7, 2022
DEPARTMENT OF AGRICULTURE,)	
AGRICULTURE MARKETING SERVICE;)	
POULTRY GRADING BRANCH, Austin, TX,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 14, 2022 appellant filed a timely appeal from a February 24, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective February 24, 2022, because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on different issues.² The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 23, 1983 appellant, then a 32-year-old egg shell grader, filed a traumatic injury claim (Form CA-1) alleging that on February 21, 1984 he sustained a lower back injury when he caught a case of eggs that was falling from the top of a skid, while in the performance of duty. He stopped work on February 23, 1984. OWCP accepted the claim for lumbosacral strain and herniated disc at L4-5. It paid wage-loss compensation on the supplemental rolls beginning July 18, 1994.³

Appellant alleged a recurrence of total disability beginning November 1, 1995. By decision dated August 8, 2008,⁴ the Board found that appellant had established a recurrence of total disability on November 1, 1995 and directed OWCP to authorized appropriate compensation benefits beginning on that date.

Appellant continued to seek medical treatment for his accepted right knee and lower back injuries from Dr. Thomas Martens, an osteopath and family medicine specialist. Dr. Martens found in reports dated from October 24, 2016 through January 29, 2019 that appellant could return to work with restrictions on walking, standing, sitting, carrying, lifting, bending, twisting, pushing, and pulling. He prescribed pain and anti-inflammatory medications to decrease pain due to activities of daily living and found that he could not drive while using these medications. Dr. Martens reported that vocational rehabilitation services were not appropriate and that appellant was retired.

In notes dated October 9, 2019 through January 31, 2020, Dr. Karla S. Hinze, a Board-certified family practitioner, diagnosed chronic right knee and low back pain.

On April 27, 2021 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Matthew T. Burrus, Board-certified in orthopedic sports medicine, for a second opinion examination.

In his April 23, 2021 report, Dr. Burrus reviewed the SOAF, medical reports, and diagnostic testing, and performed a physical examination. He noted that appellant limped on his

² *Order Reversing Case*, Docket No. 07-2018 (issued August 8, 2008); Docket No. 07-48 (issued June 4, 2007); Docket No. 04-1758 (issued March 1, 2005); Docket No. 03-1859 (issued December 19, 2003); Docket No. 01-1591 (issued November 14, 2001); Docket No. 98-161 (issued December 13, 1999); Docket No. 94-2143 (issued August 22, 1996); Docket No. 93-72 (issued January 6, 1994); Docket No. 93-185 (issued December 17, 1993); Docket No. 91-1301 (issued January 31, 1992); Docket No. 89-1496 (issued July 3, 1990); Docket No. 84-1203 (issued September 27, 1984).

³ OWCP previously accepted under OWCP File No. xxxxxx282 that on April 5, 1979 appellant sustained a right knee effusion and internal derangement. It also accepted that he developed permanent aggravation of right knee degenerative joint disease. The current claim, OWCP File No. xxxxxx571 and OWCP File No. xxxxxx282 have been administratively combined by OWCP, with the latter serving as the master file.

⁴ *Order Reversing Case*, Docket No. 07-2018 (issued August 8, 2008).

right leg and used a cane to ambulate. Dr. Burrus found that appellant could sit comfortably. He reported decreased sensation on the lateral aspect of the right knee, tenderness on palpation of the right knee, and loss of strength of 4/5 throughout the right lower extremity. Dr. Burrus also found tenderness on the right side of the lumbar spine at L2-5. He diagnosed displacement of lumbar intervertebral disc without myelopathy, internal derangement of the right knee, right lower leg pain, and osteoarthritis of the right lower leg and opined that these conditions were the direct result of appellant's accepted employment injuries. Dr. Burrus referred him for a functional capacity evaluation (FCE) on May 12, 2021 and as a result of this testing determined that he could not return to his date-of-injury position. He found that appellant could perform sedentary work with restrictions of standing and walking for two hours each, and no twisting, bending, stooping, squatting, kneeling, or climbing. Dr. Burrus restricted appellant's pushing, pulling, and lifting to 10 pounds for two hours a day.

In an undated note, Dr. Hinze reported that, due to his chronic medical conditions, appellant had difficulty sitting for extended periods of time or driving for longer distances. She concluded that it would be difficult for him to travel more than an hour from home for work.

On July 26, 2021 the employing establishment offered appellant a permanent modified light-duty position as an administrative assistant. The work was defined as sedentary and typically required sitting, but would also include some walking, standing, bending, and carrying of light items such as papers or books. The assigned tasks included activities pertaining to travel, budget, personnel, procurement, administrative services, and support activities. The tour of duty was 8:00 a.m. to 4:30 p.m., Monday through Friday. The position was located at an employing establishment service center in Edna, Texas. The employing establishment requested a response within 14 days.

In a letter dated October 27, 2021, OWCP advised appellant that the offered position of administrative assistant was found to be suitable to his capabilities and was currently available. It found the position suitable and in accordance with his medical limitations. OWCP provided appellant 30 days to accept the position or provide written reasons for his refusal. It informed him that if he failed to accept the offered position and failed to demonstrate that the refusal of the offer of suitable work was justified, his compensation would be terminated, pursuant to 5 U.S.C. § 8106(c)(2).

Appellant responded on November 2, 2021 and asserted that the offered position was located more than one hour drive from his home, in violation of Dr. Dr. Hinze's restrictions. He also noted that his pain medication made him sleepy and light-headed, which would affect his driving and working abilities. Appellant alleged additional conditions prevented him from performing the offered position and that Dr. Hinze should be allowed to provide work restrictions.

In a December 7, 2021 letter, OWCP advised appellant that the offered position remained suitable and available to him, and that his reasons for refusing to accept the offered position were not valid. It afforded him 15 additional days to accept and report to that position or his entitlement to wage-loss compensation and schedule award benefits would be terminated. No response was received.

By correspondence dated February 15, 2022, OWCP informed appellant of its intent to terminate his wage-loss compensation and entitlement to a schedule award effective that date as

he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that he had not accepted the position within the allotted 15-day time period. OWCP determined that the job was suitable as the position may be performed within the prescribed restrictions. It found that appellant's failure to report to the offered position was not justified as he had not submitted evidence that the position was beyond his abilities. This correspondence did not include appeal rights.

By decision dated February 24, 2022, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective that date, as he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2) and provided his appeal rights. It noted that he had not accepted the position within the allotted 15-day time period. OWCP determined that the job was suitable as the position may be performed within the prescribed restrictions. It found that appellant's failure to report to the offered position was not justified as he had not submitted evidence that the position was beyond his abilities.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's compensation benefits.⁵ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.⁶ To justify termination of compensation, OWCP must show that the work offered was suitable, that the employee was informed of the consequences of refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position or submit evidence to provide reasons why the position is not suitable.⁷ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.⁸

Section 10.517(a) of FECA's implementing regulations provide that an employee who refuses or neglects to work after suitable work has been offered or secured, has the burden of showing that such refusal or failure to work was reasonable or justified.⁹ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.¹⁰

⁵ See *T.H.*, Docket No. 19-1143 (issued May 13, 2022); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ 5 U.S.C. § 8106(c)(2); see also *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *Geraldine Foster*, 54 ECAB 435 (2003).

⁷ See *R.A.*, Docket No. 19-0065 (issued May 14, 2019); *Ronald M. Jones*, 52 ECAB 190 (2000).

⁸ *Y.J.*, Docket No. 20-1562 (issued December 14, 2021); *S.D.*, Docket No. 18-1641 (issued April 12, 2019); *Joan F. Burke*, 54 ECAB 406 (2003).

⁹ 20 C.F.R. § 10.517(a).

¹⁰ *Id.* at § 10.516.

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹¹ OWCP procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹² In a suitable work determination, OWCP must consider preexisting and subsequently-acquired medical conditions in evaluating an employee's work capacity.¹³

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective February 24, 2022.

To determine appellant's ability to return to work, OWCP referred him for a second opinion evaluation with Dr. Burrus. In his report dated April 23, 2021, Dr. Burrus opined that appellant could return to modified work with a number of restrictions including no twisting, bending, stooping, squatting, kneeling, or climbing.

The employing establishment, thereafter on July 26, 2021, offered appellant a modified administrative assistant position, which was purportedly based on the restrictions provided by Dr. Burrus. The duties of the position, however, included some walking, standing, bending, and carrying of light items such as papers or books.

The Board has held that, for OWCP to meet its burden of proof in a suitable work termination, the medical evidence should be clear and unequivocal that the claimant could perform the offered position.¹⁴ As a penalty provision, the termination of compensation benefits is narrowly construed.¹⁵ The modified duty position did not on its face meet Dr. Burrus' restrictions. He opined that appellant could not bend, which was a requirement of the offered position. The Board finds that OWCP has not established that the suitable work position was within appellant's work restrictions, as provided by Dr. Burrus. Therefore, the Board finds that it has not met its burden of proof and thus erroneously terminated appellant's compensation entitlement under section 8106(c)(2).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective February 24, 2022.

¹¹ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); see *E.B.*, Docket No. 13-0319 (issued May 14, 2013).

¹³ See *G.R.*, Docket No. 16-0455 (issued December 13, 2016); *Richard P. Cortes*, 56 ECAB 200 (2004).

¹⁴ See *D.C.*, Docket No. 19-1297 (issued October 5, 2021); *A.F.*, Docket No. 19-0453 (issued July 6, 2020); *Annette Quimby*, 49 ECAB 304 (1998).

¹⁵ *R.M.*, Docket No. 19-1236 (issued January 24, 2020); *R.A.*, Docket No. 19-0065 (issued May 14, 2019); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 7, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board